INTERIOR BOARD OF INDIAN APPEALS

H.S.C. Logging, Inc. v. Acting Deputy Assistant Secretary - Indian Affairs (Operations)

12 IBIA 181 (03/01/1984)

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

H.S.C. LOGGING, INC.
v.
ACTING DEPUTY ASSISTANT SECRETARY--INDIAN AFFAIRS (OPERATIONS)

IBIA 83-50-A Decided March 1, 1984

Appeal from a decision of the Deputy Assistant Secretary--Indian Affairs (Operations) dismissing an appeal for failure to include a statement of reasons for the appeal or to file arguments in support of the appeal.

Reversed and remanded.

1. Bureau of Indian Affairs: Administrative Appeals: Generally--Rules of Practice: Appeals: Dismissal

   A determination under 25 CFR 2.17 as to whether an appeal should be dismissed or decided on the merits when an appellant has failed to submit supporting argumentation must be based on the facts of each case.

APPEARANCES: Alan I. Saltman, Esq., and Carl J. Peckinpaugh, Esq., Washington, D.C., for appellant; Chedville L. Martin, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for appellee. Counsel to the Board: Kathryn A. Lynn.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

On September 6, 1983, the Board of Indian Appeals (Board) received a notice of appeal from H.S.C. Logging, Inc. (appellant), seeking review of a July 1, 1983, decision of the Acting Deputy Assistant Secretary--Indian Affairs (Operations) (appellee). The decision dismissed the appeal for failure to include a statement of reasons for the appeal or to file arguments in support of the appeal within the 30-day time period established in 25 CFR 2.10(a). The appeal was dismissed under authority of 25 CFR 2.17. For the reasons discussed below, the Board reverses the decision and remands the case to appellee for consideration on the merits.

Background

On January 5, 1981, appellant entered into Timber Sale Contract No. P11C14201573 with the Confederated Tribes and Bands of the Yakima Indian Nation (tribe). The contract covered the Grayback Mountain Logging Unit. Timber cut under this contract was scaled by the Bureau of Indian Affairs (BIA) to determine the amount owed to the tribe.

Appellant alleges that it discovered in July 1982 that BIA's scaling was inaccurate because it did not adequately take into consideration certain

hidden defects in the timber caused by fire scars. Appellant calculated that it had been overcharged $341,145 on 5,985,030 board feet of timber. Appellant submitted a claim for that amount to BIA on July 29, 1982. The claim was denied by the Yakima Agency Superintendent on August 25, 1982.

On September 22, 1982, appellant sought review of the denial of its original claim by the Portland Area Office, BIA, and filed a supplemental claim for $4,000,000. On October 5, 1982, the Acting Portland Assistant Area Director (Economic Development) informed appellant that it had until October 20, 1982, to perfect its appeal. Appellant wrote the Area Office on October 19, 1982, that it did not know what else it should do to perfect the appeal. Appellant's submissions were subsequently treated as a perfected appeal. The Assistant Area Director (Economic Development) affirmed the Superintendent's decision and denied appellant's supplemental claim for damages on March 10, 1983.

By notice of appeal dated March 21, 1983, appellant sought review of these decisions by appellee. The notice states at pages 1-2 that it seeks review of the March 10, 1983, decision and that it was based on the following principles:

> 1. The appellant has never been allowed a hearing at which he was allowed to examine witnesses and present evidence.
>
> 2. There has never been a verbatim record made of any hearing and the hearing officers have selected only the evidence which they chose to include supporting the position of the Agency for which they work.
>
> 3. Evidence presented at different times in different forms through informal process has been ignored and not included in a verbatim record.
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> 4. The pseudo hearing officers have acted as advocates on behalf of the Yakima Indian Nation and not as impartial hearing officers.
>
> 5. Appellant has been denied due process.
>
> 6. Appellant has been denied equal protection of the law.
>
> 7. The appellant has been deprived of its property without due process in violation of their civil rights pursuant to U.S. Code, Section 1983, having been denied their civil rights under color of law and having been damaged in excess of one million dollars.
>
> 8. All proceedings have been irregular and illegal.
>
> 9. The examiners have exceeded their authority, acting arbitrarily and capriciously.
>
> Finally, the appellant requests a review de novo of all actions to date, and that such review be held in a formal setting and that a verbatim record be kept; that witnesses be sworn

> and that cross examination of the witnesses be allowed, none of which has taken place to date in what appears to be a sham procedure.

By letter dated July 1, 1983, appellee dismissed the appeal "on the grounds that it has not been timely filed." In support of this conclusion, appellee states: "Your notice of appeal does not include a statement of reasons for the appeal nor have you filed documents arguing or supporting the rationale behind your appeal within the 30 days required by [25 CFR 2.10(a)]."

In accordance with appeal procedures set forth in appellee's dismissal, appellant filed the present appeal with the Board. On September 7, 1983, the Board ordered briefing limited to the issue of timeliness. Briefs have been received from both parties.

Discussion and Conclusions

This matter is before the Board on the limited issue of whether appellee erred in dismissing appellant's appeal for the reasons stated in appellee's July 1, 1983, decision. The determination of this issue requires construction of two regulations. First, 25 CFR 2.10(a) provides in pertinent part:

> A notice of appeal shall be in writing and filed in the office of the official who made the decision that the appellant wishes to appeal. * * * The appeal shall give an identification of the case, a statement of reasons for the appeal, and any arguments the appellant wishes to make. The notice of appeal must be received in the office of the official who made the decision within 30 days after the date notice of the decision complained of is received by the appellant, together with all supporting documents. The appellant shall file his appeal with the Area Director or the Commissioner within 30 days after filing the notice of appeal in the office of the official who made the decision being appealed.

Section 2.17 provides for summary dismissal under certain circumstances:

> An appeal to the Area Director or the Commissioner may be subject to summary dismissal for any of the following causes:
>
> (a) If a statement of the reasons for the appeal is not included in the appeal.
>
> (b) If the notice of appeal and/or appeal together with any supporting documents are not filed or not served upon the interested parties as required in §§ 2.10, 2.11, and 2.13 of this part.

These regulations contemplate the filing of two documents: a "notice of appeal" and an "appeal," which is apparently the equivalent of a brief in support of the appeal.

Appellee acknowledges that appellant's notice of appeal was properly and timely filed. However, because appellant did not file an "appeal" document, appellee argues that the appeal was not timely filed and should be dismissed.

Appellant alleges that the "notice of appeal" filed also complied with the requirements for an "appeal," and the one filing should have been found sufficient under the regulations. Appellant further argues that appellee had or should have had the entire administrative record before him when he dismissed the appeal, and that the arguments were fully set forth in the record.

Appellee contends that even if all of the information needed for a decision were before him, "the one essential document necessary for him to render a decision was missing--a clear statement of reasons which shows affirmatively in what respect the decision appealed from was in error" (Answer brief at 5). Appellee further describes appellant's March 21, 1983, notice of appeal as containing merely "totally unsupported claims," and concludes that "[i]n the absence of any substantiating reasons to support these allegations, they must be considered frivolous and an attempt to shift on the Department the burden of determining whether an error has been committed" (Answer brief at 6, citing and quoting from United States v. Coppridge, 17 IBLA 323 (1974)). 1/

[1] It is clear that 25 CFR 2.17, like the comparable regulation of the Board of Land Appeals, 43 CFR 4.412, which was cited by appellee as similar authority for dismissal, permits the deciding official to determine whether an appeal should be decided on the merits or dismissed. This determination must be based on the specific facts of each individual case. Cf., e.g., Coppridge, supra, (dismissed); with Rocky Mountain Natural Gas Co., 55 IBLA 3 (1981), and United States v. Weigel, 26 IBLA 183 (1976) (both cases decided on the merits).

Furthermore, under 25 CFR 2.10(a) an appellant is required only to submit "any arguments * * * [he] wishes to make." This regulation thus permits an appellant to choose not to file arguments in support of the appeal.

In the present case, appellant's initial appeal filed with the Area Director evidences substantially the same problems as the notice of appeal filed with appellee. These two notices of appeal were both filed under 25 CFR 2.10. In interpreting this regulation, the Area Director accepted the appeal with no elaboration by appellant beyond what was already included in the record. See exhibits 3-7 to appellant's opening brief. Appellee

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1/ Under 5 U.S.C. § 556(d) (1976), the party seeking agency action has the burden of proving that the action sought is appropriate. In an administrative appeal, the appellant thus has the burden of showing that the decision appealed from was in error. See, e.g., Estate of Frank Pays, 10 IBIA 61 (1982); Save the Glades Committee, 54 IBLA 215 (1981); Hyatt Lake Landowner's Ass'n, 48 IBLA 159 (1980). The failure to file specific arguments alleging how the decision below is in error may determine whether or not the appellant sustains its burden of proof. An appeal not supported by arguments on appeal or evidence already in the record may properly be denied on the grounds that the appellant has failed to show that the decision appealed from was in error.

Furthermore, the Board rejects appellee's suggestion that an appellant must present "persuasive arguments to demonstrate the errors in the decision being appealed" as a prerequisite to obtaining review (Answer brief at 2, emphasis added). The persuasiveness of the arguments presented determines whether the appellant will succeed on the merits, not whether there is a right to review.

dismissed appellant's second notice of appeal on the basis of a more restrictive interpretation of the same regulation.

The Board does not here decide whether or not the Area Director was required to find that appellant's appeal was proper. However, appellant was entitled to expect similar interpretations of the same regulation by the Area Director and appellee. If appellee believed that the Area Director had incorrectly applied the regulation, he had full authority to correct that error. Appellee was, however, required to explain the reasons for his more restrictive interpretation of the regulation and thereby show that the change from prior practice was neither arbitrary nor capricious. See, e.g., Bonaparte v. Commissioner of Indian Affairs, 9 IBIA 115 (1981); Howell v. United States, 9 IBIA 70, 88 I.D. 822, 823 (1981), and cases cited therein.

Appellee failed to give appellant any notice that his interpretation of the regulations differed from the interpretation that had been applied previously. Consequently, appellant was denied the opportunity to conform his conduct to appellee's interpretation, or to argue that appellee's interpretation was erroneous. See Bonaparte, supra.

Under these circumstances, the Board finds that appellee improperly dismissed this appeal as not timely filed. 2/ Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Acting Deputy Assistant Secretary's July 1, 1983, decision dismissing the appeal is reversed and the case is remanded for consideration on the merits. 3/

//original signed
Franklin D. Arness
Administrative Judge

We concur:

//original signed
Jerry Muskrat
Administrative Judge

//original signed
Bernard V. Parrette
Chief Administrative Judge

2/ The Board expresses no opinion on the merits of appellant's case because it does not have the entire administrative record before it.

3/ The Board is disturbed by a comment made in appellee's brief at page 7:
"Summary dismissal of the appeal in this case is particularly appropriate when the case before the Appellee involved a claim against the Bureau of Indian Affairs for in excess of four million dollars in damages, and where instead of presenting supported arguments to show that an error was made and that the claim was valid, the Appellant chose to plead its case by making broad unsupported attacks on the procedure and Bureau personnel."
The strategy employed by an appellant in presenting its appeal and the specific nature of the reasons for appeal are not proper grounds for decision. Neither is the amount in controversy.